Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 83-143)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds), Customs Form 7605

The following consolidated aircraft bonds have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: June 22, 1983.

Name of principal and surety	Date term commences	Date of approval	Filed with district director/area director/amount
Air National Sales & Service, 805-A Airport Rd., Monterey, CA; The Continental Ins Co.	Apr. 5, 1983	May 9, 1983	San Francisco, CA $100,000
The foregoing principal has not been designated as a carrier of bonded merchandise.			
Braniff Airways, Inc., also dba: Braniff International World Headquarters, Braniff Blvd., Dallas/Fort Worth Airport, TX; Aetna Casualty & Surety Co. D 5/31/83	May 1, 1981	May 1, 1981	Dallas/Fort Worth, TX $200,000

BON-3-01

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

19 CFR Part 10

(T.D. 83-144)

Customs Regulations Amendment Relating to the Generalized System of Preferences

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the definition of the term "imported directly," to expand that definition to allow treatment under the Generalized System of Preferences (GSP) for eligible articles which: (1) originate in a beneficiary developing country, (2) are shipped to a developed country and auctioned there, and (3) then are shipped to the United States.

By allowing those eligible articles to be entered free of Customs duty, the beneficiary developing countries of which they are products will obtain the intended benefit established by the GSP.

EFFECTIVE DATE: This rule is effective as to merchandise entered or withdrawn from warehouse, for consumption on or after June 28, 1983.

FOR FURTHER INFORMATION CONTACT: Francis W. Foote, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5727).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Title V of the Trade Act of 1974, as amended (19 U.S.C. 2461-2465), authorizes the President to establish a Generalized System of Preferences (GSP) to provide duty-free treatment for eligible articles imported directly from designated beneficiary developing countries (BDCs). BDCs and articles eligible for GSP treatment are designated by the President by Executive Order in accordance with the provisions of the Trade Act. The Customs Regulations issued to administer the GSP are contained in sections 10.171-10.178 (19 CFR 10.171-10.178).

A notice was published in the Federal Register on April 7, 1983 (48 FR 15153), inviting public comments on Customs intention to expand the definition of "imported directly" in section 10.175, Customs Regulations (19 CFR 10.175), to encompass the traditional marketing procedure established for "Cameroon wrapper tobacco," as described in detail in that document. All information contained in the Supplementary Information Background section of that notice is hereby incorporated by reference in this document.

DISCUSSION OF COMMENTS

Four comments were received in response to the notice. Three commenters were generally in favor of the proposal and one was opposed.

One commenter in favor of the proposal requested that an explanatory comment be published with the final rule to clarify that the new provisions would apply to shipments of all merchandise meeting the new criteria rather than only to the "Cameroon wrapper" tobacco specifically discussed in the notice. Another commenter, although also in favor of the proposal, requested that the words "except for sale other than at retail" be deleted from proposed new paragraph (d)(3) in order to avoid the implication that the sale of merchandise while in a customs bonded warehouse in an intermediate country would mean that the merchandise had entered the commerce of that country. This comment was based on the fact that under section 10.175(c) the purchase and resale of merchandise within a free trade zone maintained in a beneficiary developing country does not constitute entry of that merchandise into the commerce of that country. This commenter further suggested that the proposed new rule should specify an effective date coextensive with the effective date of Executive Order 12311 which gave GSP treatment to the subject tobacco so that all wrapper tobacco entered, or withdrawn from warehouse for consumption, on or after July 4, 1981, would be eligible for GSP treatment in accordance with the intent behind the Executive Order. The third commenter not opposed to the proposal suggested that, in order to ensure uniformity in the application of the GSP, Customs should specify what constitutes evidence sufficient to establish that a shipment complies with the requirements of the new provision.

The commenter opposed to the proposal questioned whether the legislative history relating to the GSP indicated a Congressional intent to confer duty-free treatment on the subject tobacco and whether it was proper to redefine the statutory term "imported directly" in the regulations. This commenter further suggested (1) that it would be difficult to maintain control over GSP merchandise to ensure that merchandise is not processed beyond the limits set forth in section 10.175, and (2) that the proposed rule will significantly increase the administrative workload of Customs.

With respect to the first comment, the new provisions will not apply only to "Cameroon wrapper" tobacco since no such limitation is contained in the proposed text. As concerns the proposal to delete the words "except for sale other than at retail" from proposed new paragraph (d)(3), these words should be retained so that the new provisions will conform to the limited factual situation which gave rise to the proposal, and in this regard it should also be noted that a customs bonded warehouse is not necessarily to be equated with the "free trade zone" mentioned in present section 10.175(c). The proposal to specify a retroactive effective date is not

acceptable since such retroactivity would apply equally to merchandise other than wrapper tobacco; thus, the effect would be far broader than that intended by the commenter and would impose an inordinate administrative burden on Customs which would be required to reliquidate prior entries of other types of merchandise falling within the criteria set forth in the new rule. As concerns the suggestion that Customs specify what constitutes evidence to ensure compliance with the new provision, it is believed that it would be preferable to allow a certain amount of flexibility so that the district director of Customs will have discretion whether to allow GSP treatment based on the particular facts and evidence involved in each individual case.

With respect to the negative comment received, it is noted that the Congressional intent was to confer duty-free treatment on merchandise to be designated by the President as eligible for GSP treatment; the fact that the President designated wrapper tobacco as an eligible article under his delegated authority to do so is wholly consistent with the legislative intent behind the GSP. As concerns the definition of "imported directly", it is to be noted that this term appears in 19 U.S.C. 2463(b) but is not defined therein; the Secretary of the Treasury is authorized under that subsection to prescribe regulations to carry out its provisions and, therefore, the existing regulatory provisions and the new proposal under consideration are entirely appropriate. The alleged difficulties in maintaining control over GSP merchandise are equally applicable to the present GSP regulations and no particular problems appear to have been experienced with the existing provisions. Finally, Customs has determined that the rule, as adopted, will not result in a significant increase in the administrative workload of Customs.

After consideration of the comments, as discussed above, and further review of the matter, Customs has determined to adopt the proposal without modification.

Inapplicability of Delayed Effective Date

Because the next annual sale of Cameroon wrapper tobacco eligible to receive GSP treatment under the criteria specified in this rule is to occur during June 1983, Customs has determined that good cause exists for dispensing with a delayed effective date pursuant to 5 U.S.C. 553(d)(3).

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

It is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the rule will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The principal author of this document was Todd J. Schneider, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 10

Customs duties and inspection, Generalized System of Preferences, Imports, Tobacco.

Amendment to the Regulations

Part 10, Customs Regulations (19 CFR Part 10), is amended as set forth below.

Alfred R. De Angelus,
Acting Commissioner of Customs.

Approved: June 7, 1983.
John M. Walker, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 28, 1983 (48 FR 29683)]

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

Section 10.175 is amended as follows:

§ 10.175 Imported directly defined.

1. In paragraph (b), add "or (d)" after the phrase "paragraph (c)";
2. In paragraph (c)(5), replace the period with "; or"; and
3. Add a new paragraph (d) to read as follows:

* * * * * * *

(d) If shipped from the beneficiary developing country to the United States through the territory of any other country, provided that the eligible article:

(1) Is wholly the growth or product of the beneficiary developing country;

(2) Remains under the control of the customs authorities of the intermediate country;

(3) Does not enter into the commerce of the intermediate country except for sale other than at retail, and the district director is satisfied that the importation results from the original commercial

transaction between the importer and the producer or the latter's sales agent;

(4) Has not been subjected to operations other than loading and unloading, and other activities necessary to preserve the article in good condition; and

(5) Complies with the origin requirements for goods exported to the United States under the Generalized System of Preferences, as stated in the Certificate of Origin Form A, which shall be issued by the beneficiary developing country. In addition, the beneficiary developing country shall provide, upon request, evidence sufficient to satisfy the appropriate Customs official that the shipment complies with the requirements of this paragraph.

(R.S. 251, as amended, sec. 624, 46 Stat. 759, sec. 503(b), 88 Stat. 2069, as amended (19 U.S.C. 66, 1624, 2463(b)))

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19 CFR Parts 148, 171

(T.D. 83-145)

Guidelines for Disposition of Violations of 19 U.S.C. 1497

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document sets forth revised guidelines used by the Customs Service and Treasury Department for the disposition of liabilities incurred under section 497, Tariff Act of 1930 (19 U.S.C. 1497), for the failure to declare articles to Customs upon entry into the United States. The document also amends the Customs Regulations to include the guidelines as an appendix and to reflect their issuance. Customs believes it is in the interest of the efficient and effective administration of its enforcement responsibility that the public be aware of the guidelines.

EFFECTIVE DATE: August 1, 1983. The interim guidelines, published as T.D. 82-35 in the Federal Register on February 19, 1982 (47 FR 7408), will remain in effect until the effective date of this document.

FOR FURTHER INFORMATION CONTACT: Kathryn C. Peterson, Miscellaneous Penalties Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5746).

SUPPLEMENTARY INFORMATION:

Background

Under the provisions of section 498, Tariff Act of 1930, as amended (19 U.S.C. 1498), and section 148.11, Customs Regulations (19 CFR 148.11), persons arriving in the United States from a foreign place are generally required to declare to Customs officers, at the

port of first arrival in the United States, all articles which they are bringing in with them.

As provided by section 497, Tariff Act of 1930 (19 U.S.C. 1497), failure to declare articles subjects the undeclared articles to forfeiture to the Government, and the individual who fails to declare the articles to a personal penalty equal to the value of the undeclared articles.

Ordinarily, the full statutory liability would be imposed only by judicial process. Section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), provides for an administrative process which permits the person interested in any seized articles, or who has incurred, or is alleged to have incurred, any fine or penalty, to petition for resolution of these liabilities for amounts less than the full statutory liability. This provision authorizes the Secretary of the Treasury to remit or mitigate any fine, penalty, or forfeiture, incurred under customs or navigation laws when he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances to justify such action. Part 171, Customs Regulations (19 CFR Part 171), contains provisions for the filing of petitions for relief from fines, penalties, and forfeitures incurred for violations of customs and other laws. Section 171.11, Customs Regulations (19 CFR 171.11), requires that petitions for relief be filed with the Customs Service.

The overwhelming majority of violations of section 497 are disposed of administratively pursuant to the provisions of section 618. The various district directors of Customs throughout the United States have been delegated authority by section 171.21, Customs Regulations (19 CFR 171.21), to resolve cases in which the statutory liability does not exceed $25,000, on such terms and conditions as, under the law and in view of the circumstances, they deem appropriate. The Commissioner of Customs exercises jurisdiction over cases between $25,000 and $100,000. The Secretary of the Treasury has retained authority to decide petitions for relief from liabilities arising under section 497 when those liabilities exceed $100,000.

National guidelines were developed for use in mitigating and thereby disposing of violations of section 497 administratively, in part, because many different Customs officers have authority to act on petitions for relief. Guidelines were issued in 1964, and were revised and reissued in 1974.

The primary objective of the guidelines is to encourage compliance with the entry declaration requirements. They should be sufficiently punitive to deter future violations without being overly harsh, and penalties should reflect all of the circumstances surrounding the violation in order to effect substantial justice.

Customs experience with the 1974 guidelines has been that they were too inflexible to serve these objectives. Furthermore, the 1974

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guidelines failed to provide adequate guidance for certain categories of violations.

As a result, numerous Customs districts have developed practices of taking amounts less than those specified in the 1974 guidelines, when factors justifying such mitigation were found. Although guidelines are not absolute rules and the Customs field officers acted within their discretionary authority, these actions emphasized the need for attention to uniform guidelines on a national basis.

In response to this situation, projects were commenced at the Department of Treasury and Customs to reexamine the section 497 guidelines. By T.D. 82-35, published in the Federal Register on February 19, 1982 (47 FR 7408), interim guidelines developed as a result of these projects were set forth and made effective immediately. However, public comment on the interim guidelines was invited. This document sets forth the final revised section 497 guidelines, which will be an appendix to Part 171, Customs Regulations and sets forth an amendment to section 148.18, Customs Regulations, (19 CFR 148.18).

With respect to dutiable articles, the guidelines are duty-based in that the statutory liability is remitted upon payment of an amount that is a multiple (1 times, 2 times, 3 times, etc.) of the duty that would have been owed on the articles had they been properly declared. The 1974 guidelines also used a duty-based approach. The new guidelines differ from the 1974 guidelines in that some of the multiples are different, and in the that the new guidelines list certain mitigating and aggravating factors which, if applicable, may be used to vary the multiple of the duty.

The new guidelines also state the disposition of the statutory liability with respect to the non-declaration of duty-free articles, a topic which was not addressed in the 1974 guidelines. Violations involving articles entitled to conditional duty-free entry are subject to a duty-based disposition, while violations involving articles absolutely entitled to duty-free entry are subject to disposition based upon a percentage of the domestic value of the articles. Mitigating and aggravating factors may apply to violations involving duty-free articles.

The guidelines also include numerous other rules relating to the disposition of liabilities incurred pursuant to section 497.

The document amends section 148.18 by revising paragraph (b) to reflect these new guidelines, and by removing paragraph (c). Section 148.18(a) is revised to conform with these amendments. Revised section 148.18(b) states that when an article is not declared as required by subpart B of Part 148, the penalty and forfeiture may be remitted in accordance with these new guidelines. To have present sections 148.18(b) and (c) in effect at the same time as the new guidelines could create confusion and uncertainty. Present sections 148.18(b) and (c) apply when: (1) an article was not declared as

required; (2) the article would have been free of duty and internal revenue tax if it had been properly declared; (3) its importation was not prohibited or restricted; and (4) the failure to declare was not due to willful negligence or fraudulent intent. "Willful negligence" is not addressed specifically in the new guidelines, and "intent" is addressed only as an aggravating factor, so that present sections 148.18(b) and (c) are not totally consonant with the new guidelines. Furthermore, the disposition of certain liabilities is different in present sections 148.18(b) and (c) and new guidelines. Present sections 148.18(b) and (c) provide for the complete remission of the penalty and forfeiture with respect to certain duty-free articles when the requirements of section 148.18(b) were met, while the new guidelines provide for a penalty based upon the domestic value of the articles for absolutely duty-free articles.

We believe that the new guidelines provide for additional deterrence, flexibility, consistency, and guidance.

Discussion of Comments

Numerous comments were received in response to the publication of the interim guidelines.

The fact that the undeclared articles were commercial articles was stated to be an aggravating factor in the interim guidelines. One commenter thought that those failing to declare commercial articles should be held to a higher standard because of the higher degree of knowledge of Customs requirements imputed to those importing articles for commercial purposes. Another thought that commercial violators should be treated more harshly than ordinary, non-commercial violators. Customs agrees with both of these comments and has created a separate category for violations involving commercial articles.

Some commenters observed that there were several places in the interim guidelines where it would be possible, in the case of low-value goods, to have a less severe penalty for a violation where aggravating factors are present, than for a violation where aggravating factors are not present. Customs agrees with these comments, and minimum amounts or a reference to the domestic value have been added to the guidelines to correct this problem.

One commenter correctly pointed out a conflict between the mitigating factors set forth in I.A.2.a. of the interim guidelines and section 148.16(b), Customs Regulations. As a result, that mitigating factor has been deleted from the guidelines.

Two commenters disapprove of considering informant information as an aggravating factor. Customs believes that the fact that a person other than the violator had knowledge of the violation tends to establish specific intent on the part of the violator. However, the language of this aggravating factor has been amended to clearly set forth its purpose.

Two commenters state that the examples given of "extreme lack of cooperation," which is an aggravating factor, are inappropriate. As a result of this comment "rude behavior" has been deleted from this factor, and the language of the factor has been rephrased to emphasize the "lack of respect for law and authority."

One commenter opines that the guidelines should specifically state that aggravating factors may be offset by mitigating factors. Although this was intended in the guidelines, it has been added in the "Other Applicable Rules" section as suggested.

Two commenters suggest referencing in the guidelines an internal Customs directive that the rate of duty to be used in computing the penalty amount is the appropriate rate from Schedules 1–7, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), and not the flat rate from Schedule 8, TSUS. This suggestion has been adopted.

One commenter recommended that the guidelines provide for the collection of internal revenue tax, when it is owed. Customs agrees and has added a statement that duty includes any internal revenue tax which would have attached upon importation (see also section 101.1(i), Customs Regulations (19 CFR 101.1(i)), which defines "duties").

One commenter believes that minimum amounts are confusing and may produce inequitable results. Customs believes that minimum amounts are important from the standpoint of providing a meaningful penalty that will deter future violations, and does not think they will create administrative problems. The minimum amounts have been retained and, in some places, added.

One commenter maintains that the guidelines fail to address the situation in which the violator has no knowledge of the declaration requirements. Customs makes every effort to inform a traveler of the declaration requirements. Failure of an individual to read the written material advising him of his responsibility does not excuse a subsequent violation of section 497.

A commenter contends that a traveler who establishes contributory Customs error should be entitled to complete remission of the liability, rather than merely being given the benefit of a mitigating factor. If Customs error is the sole reason for an improper declaration, a liability will not be incurred by the traveler. However, if incorrect advice given by Customs merely contributes to a violation of section 497, the Customs official should have the ability to assess a penalty, and consider the incorrect advice as a mitigating factor.

Three commenters make mention of section 148.18, Customs Regulations. One commenter states that the guidelines should cite section 148.18 and its applicability. Another contends that the guidelines have the effect of amending section 148.18. A third commenter believes that section 148.18 should apply in certain situations covered by the guidelines. As stated previously, section 148.18

is being amended to be consistent with the guidelines and to refer to them.

A commenter disagrees with the use of domestic value as a basis for calculating the penalty when absolutely duty-free articles are involved. He states that in most instances Customs simply doubles the foreign value to arrive at domestic value, and that this may result in a penalty sum exceeding the amount that would have been imposed had the articles been dutiable. Customs is developing instructions for its officers on how to compute domestic value which should resolve any problems in this regard.

Another commenter contends that a flat sum penalty is more equitable for a failure to declare absolutely duty-free articles. Customs disagrees. A percentage of the domestic value is most appropriate for a violation of this type. A percentage of the domestic value relates more equitably to the statutory liability than a flat sum does. A flat sum would encourage the non-declaration of high value duty-free articles (where non-declaration is part of a criminal scheme) because of the low risk.

A commenter states that normal disposition of a first offense should result in a penalty of *up to* three times the duty, rather than three times the duty. Customs believes that this proposal would result in confusion and a lack of uniformity.

A commenter maintains that, if an individual who has cleared Customs without discovery of any undeclared articles returns and declares the articles, the individual should be permitted to pay the duty, rather than a penalty equal to the duty. This determination is subject to the discretion of the Customs officer, with the decision to be made after consideration of all of the facts.

A commenter states that the guidelines focus only on the guilt of the traveler and do not recognize that there may not have been a violation. In the absence of a violation Customs will not assess a penalty. The guidelines are only to be used if it has been determined that there is a violation. If there is no violation, the guidelines have no application.

One commenter states that the interim guidelines are defective in that they do not comply with the requirements of the Administrative Procedure Act (5 U.S.C. 551–559), because there was no notice of proposed rulemaking, no invitation in advance of issuance to submit written data, and no delayed effective date.

The guidelines are not subject to the above-stated requirements of the Administrative Procedure Act inasmuch as notice and public procedures thereon are unnecessary and contrary to the public interest. Customs believes that it was in the public interest for the interim guidelines to become effective when published because they conferred a benefit on the public since they generally provide for lesser penalty amounts than the 1974 guidelines. Furthermore, there was a need for uniformity and immediate guidance in this area. While the guidelines became effective immediately, the public

was given an opportunity to comment on them and the comments were thoroughly considered in the formulation of the final guidelines, which will be an appendix to Part 171, Customs Regulations.

Notice and Public Procedure

Matter similar to the subject covered in section 148.18 was published as part of the interim guidelines. As pointed out by one of the commenters, existing section 148.18 is inconsistent with the guidelines. Since public comment was solicited on the guidelines, no purpose would be served by soliciting public comments on an amendment to section 148.18 to conform it to the guidelines. Accordingly, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary.

As stated previously, the guidelines are not subject to the notice and public procedure requirements of the Administrative Procedure Act inasmuch as notice and public procedure thereon are unnecessary and contrary to the public interest.

Executive Order 12291

These amendments do not constitute a "major rule" as defined in section 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

These amendments are not subject to the provisions of Pub. L. 96-354, the Regulatory Flexibility Act (5 U.S.C. 601-612), because publication of a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), or any other law.

Drafting Information

The principal author of this document was Gerard J. O'Brien, Jr., Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR

Part 148

Customs duties and inspection, Imports.

Part 171

Customs duties and inspection, Imports, Administrative practice and procedure, Law enforcement, Penalties, Seizures and forfeitures.

AMENDMENTS TO THE REGULATIONS

Parts 148 and 171, Customs Regulations (19 CFR Parts 148, 171), are amended as set forth below.

WILLIAM VON RABB,
Commissioner of Customs.

Approved: June 14, 1983.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 30, 1983 (48 FR 30098)]

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

Section 148.18 is revised to read as follows:

§ 148.18 Failure to declare.

(a) *Penalty incurred.* Any article in the baggage of a passenger arriving from a foreign country which is not declared as required by this subpart shall be seized if it is available for seizure at the time the violation is detected, and the personal penalty prescribed by section 497, Tariff Act of 1930 (19 U.S.C. 1497), shall be demanded from the passenger. If the article is not seized, a claim for the personal penalty shall be made against the person who imported the article without declaration. No duty shall be collected, because undeclared articles are treated as smuggled.

(b) *Remission of liability.* When an article not declared as required by this subpart is found in the baggage of a person arriving in the United States, the personal penalty and forfeiture may be mitigated or remitted in accordance with the Guidelines for Disposition of Violations of 19 U.S.C. 1497 in the Appendix to Part 171 of this chapter.

(R.S. 251, as amended, sec. 498, 46 Stat. 728, as amended, sec. 618, 46 Stat. 757, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1498, 1618, 1624))

PART 171—FINES, PENALTIES, AND FORFEITURES

Part 171 is amended by adding the following as Appendix A: Appendix A—Guidelines for Disposition of Violations of 19 U.S.C. 1497.

Liabilities incurred under section 497, Tariff Act of 1930 (19 U.S.C. 1497), shall be mitigated or remitted in accordance with the following guidelines (see also Part 148, Customs Regulations):

I. *Violations Involving Dutiable Articles.* For violations involving articles subject to duty and for which there is no applicable exemption from duty, the following rules apply:

1. *Mitigated Penalty for First Offense.* For violations which are the first offense, where there is knowledge of the declaration requirements, and where the undeclared articles are discovered by

the Customs officers, the liabilities shall be remitted upon payment of THREE TIMES THE DUTY (but not less than $50), or the domestic value, whichever is lower.

2. *Mitigating Factors.* When one or more of the following mitigating factors are present, the deciding officer may, within his discretion, remit the liabilities upon payment of BETWEEN ONE AND ONE-HALF AND THREE TIMES THE DUTY or the domestic value, whichever is lower:

a. Communications with the violator are impaired because of language barrier, mental condition, or physical ailment;

b. Violator cooperates with Customs officers after discovery of the violation by providing additional information which facilitates conclusion of the case;

c. Violator is an inexperienced traveler;

d. There is contributory Customs error (for example, violator demonstrates he was given incorrect advice by a Customs officer).

3. *Aggravating Factors.* When one or more of the following aggravating factors are present, the deciding officer may, within his discretion, remit the liabilities upon payment of BETWEEN THREE AND SIX TIMES THE DUTY (but not less than $100), or the domestic value, whichever is lower:

a. Documentary or other evidence discovered establishes violator's intent;

b. Informant provides information which tends to establish violator's intent and leads to discovery of the violation after the violator has been given an opportunity to properly declare;

c. Violator is an experienced traveler;

d. Undeclared articles are concealed to evade U.S. law;

e. There is behavior, including extreme lack of cooperation, verbal or physical abuse, or attempted escape, which tends to demonstrate a lack of respect for law and authority.

4. *Commercial Articles.* When the undeclared articles are brought in for commercial purposes, the liabilities shall be remitted upon the payment of SIX TIMES THE DUTY (but not less than $100), or the domestic value, whichever is lower. Mitigating factors may be used to lower this amount to as little as THREE TIMES THE DUTY; aggravating factors may be used to increase this amount up to EIGHT TIMES THE DUTY.

5. *Extraordinary Mitigating Factor.*

a. When an individual who has been cleared through Customs without discovery of any undeclared article returns to the examination area and declares that article, the deciding officer may, within his discretion, remit the liabilities upon payment of ONE TIMES THE DUTY.

b. An individual who declares articles some time later (hours, days, weeks, etc.) may be treated similarly.

6. *Extraordinary Aggravating Factors.*

a. When the offense is a second or subsequent violation, the deciding officer may, within his discretion, remit the liabilities upon payment of BETWEEN SIX AND EIGHT TIMES THE DUTY (but not less than $250), or the domestic value, whichever is lower.

b. When the offense is a second or subsequent violation, and there are aggravating factors present, generally there shall either be a denial of relief or mitigation to NO LESS THAN EIGHT TIMES THE DUTY or the domestic value, whichever is lower.

c. When there is evidence of an ongoing scheme to defraud the revenue involving multiple entries without declaration of articles subject to declaration, the deciding officer shall act in accordance with the preceding paragraph.

II. *Violations Involving Absolutely or Conditionally Free Articles.* For violations involving articles either entitled to entry free of duty absolutely (classifiable under a duty-free provision in Schedules 1–7, Tariff Schedules of the United States (TSUS); (19 U.S.C. 1202)), or entry free of duty conditionally (entitled to treatment under the Generalized System of Preferences (see section 10.171–10.178, Customs Regulations) or Schedule 8, TSUS), the following rules apply:

1. *Mitigated Penalty for First Offense.*

a. For violations which are first offense, and involve articles entitled to the benefit of GSP or Schedule 8, TSUS, the liabilities shall be remitted upon payment of ONE TIMES THE DUTY which would have been due if the articles had not been entitled to the benefit.

b. For violations which are first offense, and involve absolutely duty-free articles, the liabilities shall be remitted upon payment of BETWEEN ONE AND FIVE PERCENT OF THE DOMESTIC VALUE, but not less than $50 (or the domestic value, whichever is less) nor more than $1,000.

2. *Mitigating Factors.* When mitigating factors such as those outlined above are present, the deciding officer may, in his discretion, reduce the mitigated amount to a lower figure.

3. *Aggravating Factors.*

a. When aggravating factors such as those outlined above are present, the deciding officer may, in his discretion, remit the liabilities for conditionally free articles upon the payment of BETWEEN ONE AND TWO TIMES THE DUTY (but not less than $100), or the domestic value, whichever is lower.

b. For absolutely free articles, the deciding officer may remit the liabilities upon payment of BETWEEN FIVE AND TEN PERCENT OF THE DOMESTIC VALUE, but not less than $100.

4. *Commercial Merchandise.*

The fact that undeclared duty-free articles are imported for commercial purposes may be considered an aggravating factor under section II.3. of these guidelines.

III. *Other Applicable Rules.*

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1. These guidelines provide a framework and procedure by which violations of 19 U.S.C. 1497 are to be analyzed. They are not mandatory in the sense that they must be absolutely applied. Customs officers varying from these guidelines must provide reasons for doing so in the case record.

2. Customs officers shall document mitigating and aggravating factors found in each case in the case file. There must be a basis shown for mitigated amounts.

3. It is intended that mitigating and aggravating factors shall be considered together and used to offset each other where appropriate.

4. The rate of duty to be used in calculating the mitigated penalty shall be the appropriate rate from Schedules 1-7, TSUS, and not the flat rate from Schedule 8, TSUS.

5. "Duty" means Customs duties and any internal revenue taxes which would have attached upon importation (see section 101.1(i), Customs Regulations). Therefore, multiples will also be applied to internal revenue taxes which would have been due.

6. Customs officers may, within their discretion, consider other factors not here delineated as aggravating or mitigating and apply the guidelines accordingly. These additional factors must also be documented in the case file.

7. These guidelines are not authority for admitting into the commerce of the United States articles which are conditionally or absolutely prohibited from entry.

8. The presence of one or more extraordinary aggravating factors, including but not limited to those set forth in section I.6. of these guidelines, may within the discretion of the deciding officer be a basis for denial of relief.

9. If the violator is being prosecuted criminally, the civil (19 U.S.C. 1497) liability generally is administratively settled only after completion of the prosecution or with the express approval of the appropriate U.S. attorney. Criminal prosecution of the violator, however, is insufficient grounds to delay indefinitely determination of the civil liability. The district director or area director should contact the Regional Counsel of Customs to determine the best course of action to follow with respect to the civil liability. Regional Counsel will consult with the U.S. attorney and the Miscellaneous Penalties Branch at Customs Headquarters. Because of time delay problems, all *seizures* involving criminal prosecutions must be promptly coordinated in this manner, and consideration should be given to immediate referral of the forfeiture action to the U.S. attorney for the institution of a judicial proceeding.

(R.S. 251, as amended, sec. 498, 46 Stat. 728, as amended, sec. 618, 46 Stat. 757, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1498, 1618, 1624))

19 CFR Part 101

(T.D. 83-146)

Change in the Customs Service Field Organization

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to change the Customs Service field organization by extending and redefining the geographical limits of the port of Seattle, Washington, within the consolidated Customs port of entry of Puget Sound, Washington. The change is being made because commercial operations requiring the services of Customs personnel have been established in areas beyond the territory within the current limits of the Seattle port.

EFFECTIVE DATE: August 4, 1983.

FOR FURTHER INFORMATION CONTACT: Richard C. Coleman, Office of Inspection, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

The limits of the consolidated Customs port of entry of Puget Sound, Washington, were extended by T.D. 79-169, published in the Federal Register on June 15, 1979 (44 FR 34478). Since that time commercial operations requiring the services of Customs personnel have been established in areas beyond the territory within the current limits of the Seattle, Washington, port, which is within the consolidated port of entry of Puget Sound. The volume of cargo moving through the port of Seattle, Washington, has grown substantially and many new facilities for clearing, storing, and forwarding imported merchandise have moved or are contemplating moving from their waterfront locations to facilities outside of the present port limits. As part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and in order to provide better service to carriers, importers, and the public, on November 30, 1981, Customs published a notice in the Federal Register (46 FR 58093), proposing to extend and redefine the geographical limits of the Puget Sound port of entry. The document proposed to eliminate specific reference to the ports of "Kenmore Air Harbor" and "Renton Municipal Airport and Seaplane Base," as set forth in T.D. 79-169, with the territories encompassed by both of those ports included within the limits of the port of Seattle, as extended. Neither Kenmore Air Harbor nor Renton Municipal Airport and Seaplane Base is manned continually by Customs personnel. Both are serviced by Customs personnel from

Seattle on an "as-needed" basis. In addition to the port of Seattle, as extended, the consolidated port of Puget Sound includes all of the area within the present port limits of Anacortes, Bellingham, Everett, Friday Harbor, Neah Bay, Olympia, Port Angeles, Port Townsend, and Tacoma, Washington. Other than extending the port limits of Seattle, there will be no change in Customs service to the other ports in the Puget Sound port of entry.

No comments were received in response to the notice proposing this change. Accordingly, after further review of the matter, it has been determined to adopt the change with one minor alteration. The description of the geographical limits of the port of Seattle within the consolidated port of Puget Sound, Washington, as stated in the notice proposing the change, is modified and simplified in this document. Instead of using geographical sections to describe the territorial boundaries of the Seattle port, popular names of streets are substituted. The area described is the same, but the description is now simpler and more comprehensible. This document amends section 101.3, Customs Regulations (19 CFR 101.3), to change the Customs field organization by extending and redefining the geographical limits of the consolidated port of entry of Puget Sound.

Changes in the Customs Service Field Organization

Under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II) and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449), the limits of the consolidated port of Puget Sound, Washington, are extended and redefined to be as follows:

The ports of Seattle (section 35, Township 27 North, Range 3 East, West Meridian, County of Snohomish, and the geographical area within the boundaries beginning at the intersection of N.W. 205th Street and the waters of Puget Sound, proceeding in an easterly direction along the King County line to its intersection with 100th Avenue N.E., thence southerly along 100th Avenue N.E. and its continuation to the intersection of 100th Avenue S.E. and 240th Street S.E., thence westerly along 240th Street S.E. to its intersection with N.W. 205th Street, the point of beginning, County of King, all within the State of Washington), Anacortes, Bellingham, Everett, Friday Harbor, Neah Bay, Olympia, Port Angeles, Port Townsend, and the territory in Tacoma beginning at the intersection of the westernmost city limits of Tacoma and The Narrows and proceeding in an easterly, then southerly, then easterly direction along the city limits of Tacoma to its intersection with Pacific Highway (U.S. Route 99), then proceeding in a southerly direction along Pacific Highway to its intersection with Union Avenue Extended and continuing in a southerly direction along Union

Avenue Extended to its intersection with the northwest corner of McChord Air Force Base, then proceeding along the northern, then western, then southern boundary of McChord Air Force Base to its intersection, just west of Lake Mondress, with the northern boundary of the Fort Lewis Military Reservation, then proceeding in an easterly direction along the northern boundary of the Fort Lewis Military Reservation to its intersection with Pacific Avenue, then proceeding in a southerly direction along Pacific Avenue to its intersection with National Park Highway, then proceeding in a southeasterly direction along National Park Highway to its intersection with 224th Street, East, then proceeding in an easterly direction along 224th Street, East, to its intersection with Meridian Street, South, then proceeding in a northerly direction along Meridian Street to the northern boundary of Pierce County, then proceeding in a westerly direction along the northern boundary of Pierce County to its intersection with Puget Sound, then proceeding in a generally southwesterly direction along the banks of the East Passage of Puget Sound, Commencement Bay, and The Narrows to the point of intersection with the westernmost city limits of Tacoma, including all points and places on the southern boundary of the Juan de Fuca Strait from the eastern port limits of Neah Bay to the western port limits of Port Townsend, all points and places on the western boundary of Puget Sound, including Hood Canal, from the port limits of Port Townsend to the northern port limits of Olympia, all points and places on the southern boundary of Puget Sound from the port limits of Olympia to the western port limits of Tacoma, and all points and places on the eastern boundary of Puget Sound and contiguous waters from the port limits of Tacoma north to the southern port limits of Bellingham, all in the State of Washington.

List of Subjects in 19 CFR Part 101

Customs duties and inspection, imports, organization.

Amendment to the Regulations

PART 101—GENERAL PROVISIONS

To reflect this change, the column headed "Ports of entry" in the list of Customs regions, districts, and ports of entry in section 101.3, Customs regulations (19 CFR 101.3), is amended by removing "Kenmore Air Harbor" and inserting "T.D. 83–146" in place of "T.D. 79–169", in the description for the consolidated port of entry of Puget Sound, Washington, in the Seattle, Washington, Customs district.

Executive Order 12291

Because this amendment relates to the organization of the Customs Service, pursuant to section 1(a)(3) of E.O. 12291, it is not subject to that E.O.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this amendment. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this change may have a limited effect upon some small entities in the Puget Sound area, it is not expected to be significant because the extension of the limits of Customs ports of entry in other locations has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. Accordingly, it is certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendment will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The principal author of this document was James S. Demb, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Alfred R. De Angelus,
Acting Commissioner of Customs.

Approved: June 23, 1983.

John M. Walker, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 5, 1983 (48 FR 30611)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 22

Advance Notice of Proposed Customs Regulations Amendments Relating to Liquidation of Drawback Claims

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Advance Notice of Proposed Rulemaking and Solicitation of Comments.

SUMMARY: Customs has under consideration several initiatives as part of its general review of improving the processing of drawback claims. Drawback is a refund or remission, in whole or in part of a customs duty, internal-revenue tax, or fee lawfully assessed or collected because of a particular use made of the merchandise on which the duty or tax was assessed or collected. The rationale for drawback has always been to encourage American commerce or manufacturing, or both.

Currently, there are nine liquidation units located within the seven Customs regions. The purpose of this advance notice is to inform the public that to reduce the backlog of pending drawback claims and facilitate processing of refunds to claimants, while at the same time, ease the workload burden on Customs personnel, Customs is considering consolidating the number of drawback liquidation units. One proposal being considered is that only one drawback liquidation unit would be located in Chicago in the North Central Region. Under another proposal, only four drawback liquidation units would be located within four regions. As an alternative to this approach, Customs also is considering processing drawback claims relating to certain commodities only at specified locations, perhaps at one of the four remaining consolidatd locations.

If a proposal is adopted, numerous amendments to the Customs Regulations will be necessary and will be the subject of a notice of proposd rulemaking published in the Federal Register. The public is inivited to comment on the merits of the proposal as well as suggest alternatives to the proposal which will accomplish the objective of improving the processing of drawback claims.

DATE: Comments must be received on or before Sept. 6, 1983.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Betty L. Colburn, Duty Assessment Division (202–566–5307), U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Drawback is a refund or remission, in whole or in part of a customs duty, internal-revenue tax, or fee lawfully assessed or collected because of a particular use made of the merchandise on which the duty or tax was assessed or collected.

The rationale for drawback has always been to encourage American commerce or manufacturing, or both. It permits the American manufacturer to compete in foreign markets without the handicap of including in his costs, and consequently in his sales price, the duty paid on imported merchandise. Customs administers the drawback law and is responsible for enforcing its regulations, advising drawback claimants, reviewing documentation, auditing the claimant's records, and liquidating drawback entries.

On August 26, 1982, as part of the general revision of the Customs Regulations, Customs published a document in the Federal Register proposing to revise its regulations by removing Part 22 (19 CFR Part 22), relating to drawback, and adding a new Part 191 (47 FR 37563). Interested parties were given until November 24, 1982, to submit comments. Pursuant to several requests, by notice published in the Federal Register on November 28, 1982 (47 FR 53402), Customs extended the period of time for the submission of written comments to January 21, 1983. The numerous comments received in response are currently under review by Customs.

Since publication of the proposed revision, Customs has undertaken consideration of several other initiatives as part of its general review of improving the processing and liquidation of drawback claims. Because of the increase in the number of drawback claims filed, the continuing demand for Customs assistance, and the increase in the backlog nationwide, the ability of Customs to provide services satisfactorily is diminishing. In order to bridge the gap between the number of claims filed and the number of entries liquidated, as well as to assist drawback participants and retrieve entries timely, Customs is considering alternative procedures to facilitate the processing and liquidation of drawback claims.

Currently, there are nine liquidation units consisting of 44 drawback liquidators located within the seven Customs regions as follows:

Location and Region

Boston—Northeast Region
Baltimore—Northeast Region
New York—New York Region
Miami—Southeast Region
New Orleans—South Central Region
Houston—Southwest Region
Los Angeles—Pacific Region
San Francisco—Pacific Region
Chicago—North Central Region

VOLUME/LOCATION

A review of the existing problems relating to the drawback backlog reveals that nationally, over the past 5 years, there has been an increase of approximately 44 percent in the number of drawback claims filed.

Going back 4 years, the concentration of entries filed in the port cities of New York, Chicago, Houston, and Los Angeles, is as follows:

	New York	Chicago	Houston	Los Angeles		
1979	30,419	6,327	1,025	2,020		
1980	31,914	8,685	1,207	2,141		
1981	36,068	9,213	2,512	3,147		
1982	35,700	12,214	3,563	7,000		
Total	134,101	36,439	8,307	14,308	=	193,155

During this 4-year period, there were 266,494 drawback entries filed nationally. Those filed in the above four cities represent approximately 72.5 percent of all entries filed.

BACKLOG

The following chart shows: (1) The percentage of total unliquidated entries by region, and (2) the growing backlog by region, from 1978 to 1982, based on the Customs ARS-5401 reports:

Region	Percent fiscal year 1978	Percent fiscal year 1982	Unliquidated entries fiscal year 1978	Unliquidated entries fiscal year 1982
Boston	5.36	8.37	1,610	3,495
New York	36.92	50.01	11,081	20,899
Baltimore	5.24	9.11	1,572	3,803
Miami	2.62	8.08	786	3,371

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Region	Percent fiscal year 1978	Percent fiscal year 1982	Unliquidated entries fiscal year 1978	Unliquidated entries fiscal year 1982
New Orleans	0.51	3.06	152	1,278
Houston	2.08	4.10	623	1,712
Los Angeles	7.53	7.26	2,260	3,031
San Francisco	24.29	3.82	7,290	1,596
Chicago	15.46	6.11	4,639	2,552
Total			30,013	41,737

The backlog of unliquidated entries has increased approximately 28 percent. The four cities considered for centralization have on file 67.48 percent of all the unliquidated entries. (The former nine Customs regions were used for statistical comparison purposes.)

PROPOSALS

The purpose of this notice is to inform the public that to reduce the backlog of pending drawback claims and facilitate processing of refunds to claimants, while at the same time, ease the workload burden on Customs, Customs is considering various alternatives to improve the processing and liquidation of drawback claims.

CONSOLIDATION BY REGION

One proposal being considered is that only one drawback liquidation unit would be located in Chicago in the North Central Region. Under another proposal, the nine liquidation units located within the seven Customs regions would be consolidated so that there would remain four liquidation units located in four regions as follows:

Location and Region

New York—New York Region
Houston—Southwest Region
Los Angeles—Pacific Region
Chicago—North Central Region

If adopted, consolidation of locations may occur at the same time, or, there may be a selective phase-in process of consolidation. For example, Customs may consider consolidating over a 3-year period only one region with another during any one year. As an alternative, the nine liquidation units may be consolidated over a 5-year period with only one liquidation unit being consolidated with another during any one year.

It is contemplated that all claims for drawback would be liquidated under the supervision of the regional commissioner at one of the remaining four regions except for "same condition" drawback (section 313(j), Tariff Act of 1930, as amended, 19 U.S.C. 1313(j)),

and "rejected merchandise" (section 313(c) Tariff Act of 1930, as amended, 19 U.S.C. 1313(c)). Those types of drawback claims would remain under the jurisdiction of each of the seven regional commissioners or district directors if authority has been delegated to those officials by the regional commissioner.

CONSOLIDATION BY COMMODITY

Customs also is considering an approach to consolidate processing and liquidating drawback claims by commodity. Under this concept, if one liquidation unit within a region processes a large national percentage of drawback claims relating to a particular commodity, that liquidation unit would process all of the drawback claims for that commodity for the entire country. Entry summaries filed at any location would be transferred to the location specializing in processing drawback claims with regard to a particular commodity. Claimants could file only in the one location for the particular commodity. Examples of consolidation follow:

Petroleum or petrochemicals	Houston
Orange juice	Miami
Semi-conductors	San Francisco
Sugar	New York
Steel	New York
Piece goods	New York
Chemical products	New York
Finished and unfinished tobacco products	New York
Heavy machinery	New York
Aircraft & spacecraft	Los Angeles
Auto and auto parts	Chicago
Farm machinery & power equipment	Chicago
Plywood	Los Angeles
Tires	Chicago
Computers & equipment	Los Angeles

Some advantages of consolidation by commodity include development of commodity experts, uniformity in processing and liquidating drawback claims, increased productivity, and limited transfer of Customs personnel. Some disadvantages of consolidation by commodity include the inaccessibility of a Customs drawback specialist to importers, brokers, and claimants in all regions; possible reduction in service to all claimants, and continuation of the procedural problems (backlog and entry documentation retrieval).

CONSOLIDATION/REGION/COMMODITY

Customs also is reviewing the possibility of combining consolidation by region with consolidation by commodity. Under this approach, the nine liquidation units located within the seven regions would be consolidated so that there would remain four liquidation units located within four regions. Each liquidation unit would proc-

ess and liquidate all drawback claims relating to a particular commodity, such as indicated above, except that drawback entries for orange juice would be processed only at Houston and semi-conductors only at Los Angeles.

AUTOMATION

By consolidating liquidating units by region and/or commodity, Customs would be better able to implement further an automated computer system, such as the drawback automated processing system (DAPS) established in New York to handle much of the clerical functions relating to processing drawback claims. The advantages of DAPS include that: brokers and importer/claimants would have access to the report information generated by the computer system; the request for import entries is automated within the system; the status of all entries involved in the drawback claim is readily available, and the drawback liquidator can be identified easily. Given the existing resources available, such a computer capability may be developed in conjunction with adoption of a drawback consolidation program. It would then be possible for computer trained personnel to request, control, retrieve, and file import entries used in determining drawback. This would be beneficial to Customs, brokers, and drawback claimants.

If it is decided to proceed with this matter, numerous amendments to the Customs Regulations will be necessary and will be the subject of a notice of proposed rulemaking published in the Federal Register.

COMMENTS

Customs invites written comments (preferably in triplicate) from all interested parties on these proposals as well as suggestions for alternatives which will accomplish the objective of improving the processing and liquidation of drawback claims.

Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, U.S. Customs Service, Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT AND E.O. 12291

It does not appear that the proposal will result in a regulation which is a "major rule" as defined by section 1(b) of Executive Order 12291, or will have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. However, if it is decided to proceed with this matter, the notice of proposed rulemaking will contain an economic analysis, if

necessary, or a statement or certification that the analyses are not required.

AUTHORITY

This document is issued under the authority of R.S. 251, as amended (19 U.S.C. 66), sections 313, 624, 46 Stat. 693, as amended, 759. (19 U.S.C. 1313, 1624).

DRAFTING INFORMATION

The principal author of this document was Charles D. Ressin, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: June 23, 1983.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 5, 1983 (48 FR 30668)]

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19 CFR Part 101

Proposed Change in The Customs Service Field Organization

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: The document proposes to amend the Customs Regulations to change the Customs Service field organization by extending and redefining the geographical limits of the port of entry of Aberdeen, Washington. The proposed change would extend the existing port limits to include Bowerman Field Airport, enabling Customs to provide better service to private and commercial aircraft utilizing this airport as their port of arrival in the United States.

DATES: Comments must be received on or before (60 days from the date of publication in the Federal Register).

ADDRESS: Comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Richard C. Coleman, Office of Inspection, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs proposes to amend section 101.3, Customs Regulations (19 CFR 101.3), by extending and redefining the geographical limits of the port of entry of Aberdeen, Washington.

Prior to this proposal, T.D. 56229, published in the Federal Register on July 31, 1964 (29 FR 11112), extended the geographical limits of Aberdeen, Washington, to include the corporate cities of Aberdeen, Hoquiam, and Cosmopolis, in the State of Washington. By T.D. 79–169, published in the Federal Register on June 15, 1979 (44 FR 34478), the port of entry of South Bend-Raymond, Washington, was abolished and the existing port limits of Aberdeen were extended to include the territory previously encompassed by the port of South Bend-Raymond.

The proposed change would extend the existing port limits to include Bowerman Field Airport, enabling Customs to provide better service to private and commercial aircraft utilizing this airport as their port of arrival in the United States. Bowerman Field Airport is only 200–300 yards outside the port limits of Aberdeen. It is a landing rights airport used mainly by private fliers and commercial private air taxis. Although Customs is entitled to be reimbursed for mileage travelled to service locations outside port limits, because Bowerman Field is so close, Customs has never charged mileage to collect the minimal amount which would be reimbursable. Some pilots question why Customs does not collect the mileage charge and Customs inspectors explain the situation. By extending the port limits of Aberdeen, Customs will technically correct the mileage charge issue. No additional costs in salary or travel would be incurred by Customs or the traveling public. The proposed change would remedy a bothersome situation by including Bowerman Field Airport within the limits of the port of Aberdeen.

The proposed change would extend the existing port limits of Aberdeen to include Bowerman Field Airport. This change would include the following territory within the proposed extension of the port of Aberdeen: Sections 8 and 9, Township 17 North, Range 10 West, West Meridian, County of Grays Harbor, State of Washington. Thus, the geographical limits of the port of entry of Aberdeen, Washington, would be extended and redefined to be as follows:

All of the areas within the corporate limits of the cities of Aberdeen, Hoquiam, and Cosmopolis, and the area within the limits of Bowerman Field Airport, described as sections 8 and 9, Township 17 North, Range 10 West, West Meridian, County of Grays Harbor, all in the State of Washington. If the proposed change is adopted, the list of Customs regions, districts, and ports of entry in section 101.3(b), Customs Regulations, will be amended accordingly.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

AUTHORITY

This change is proposed under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2) and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp. Ch. II) and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, imports, organization.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this proposal. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this change may have a limited effect upon some small entites in the Aberdeen, Washington, area, it is not expected to be significant because the extension of the limits of Customs ports of entry in other locations has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. Accordingly, it is certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendment, if adopted, will not have a significant economic impact on a substantial number of small entities.

EXECUTIVE ORDER 12291

Because the proposed amendment relates to the organization of the Customs Service, pursuant to section 1(a) (3) of E.O. 12291 this proposal is not subject to the Executive Order.

DRAFTING INFORMATION

The principal author of this document was James S. Demb, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: June 23, 1983.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 5, 1983 (48 FR 30670)]

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19 CFR Part 101

Proposed Customs Regulations Amendment Relating to the Customs Field Organization

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations by consolidating the ports of entry of Toledo and Sandusky, Ohio, into one port of entry, to be called Toledo-Sandusky, with its headquarters in Toledo, Ohio. If adopted, this change would enable Customs to obtain more efficient use of its personnel, facilities, and resources. It would eliminate duplication of port functions and permit better control of staffing resources without impairing services to area businesses or the general public. Moreover, it would enable Customs to provide better and more economical service to carriers, importers, and the public.

DATES: Comments must be received on or before Sept. 6, 1983.

ADDRESS: Written comments (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs ports of entry are locations (seaports airports, or land border ports) where Customs officers are assigned to accept entries of merchandise, collect duties, clear passengers, examine baggage, and enforce the customs laws and related laws.

In the list of Customs regions, districts, and ports of entry set forth in section 101.3(b), Customs Regulations (19 CFR 101.3(b)), Toledo and Sandusky, Ohio, are listed as separate ports of entry in the Cleveland, Ohio, district. Toledo and Sandusky are located approximately 50 miles apart, with most of the Customs activity in the area being handled in Toledo. Because the Customs activity at Sandusky is seasonal, it is currently staffed only by a port director and one inspector, supplemented by W.A.E. (When Actually Employed) personnel. There are no import specialists, customhouse brokers, or vessel agents located in Sandusky.

After a comprehensive study of the activity at the ports of Toledo and Sandusky, Customs has concluded that the most efficient and effective use of its personnel and resources would be made by formally consolidating these ports into one port, to be called Toledo-Sandusky, with its headquarters in Toledo. The consolidation would provide better and more economical manpower utilization and enhance Customs enforcement effectiveness. This change would give Customs better control of its staffing resources without impairing service to the public. The existing workforce would be retained. The geographical limits of the consolidated port would encompass:

All the territory within the corporate limits of the city of Toledo and the rest of Lucas County, Ohio; all the territory within the corporate limits of the cities of Rossford and Northwood and the townships of Lake and Perrysburg, all located in Wood County, Ohio; all the territory located between Ohio State Route 2 and Lake Erie from the southern limits of the eastern portion of Lucas County to the western corporate limits of the city of Sandusky; and all the territory within the corporate limits of the cities of Sandusky and Huron and Huron Township, all located in Erie County, Ohio.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

Customs ports of entry are established under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR, 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analyses (5 U.S.C. 603, 604) are not applicable to this proposal because the change, if promulgated, will not have a significant economic impact on a substantial number of small entities. There will be no meaningful reduction in Customs service as a result of this change.

Accordingly, it is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Executive Order 12291

Because this change relates to the organization of the Customs Service, pursuant to section 1(a)(3) of Executive Order 12291, it will not result in a regulation or rule subject to the Executive Order.

Drafting Information

The principal author of this document was Jesse V. Vitello, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Imports, Organization and functions (Government agencies).

Proposed Regulations Amendment

If the proposed change is adopted, the list of Customs regions, districts, and ports of entry in section 101.3, Customs Regulations (19 CFR 101.3), will be amended accordingly.

Alfred R. De Angelus,
Acting Commissioner of Customs.

Approved: June 7, 1983.
John M. Walker, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 5, 1983 (48 FR 30671)]

(19 CFR Part 175)

Receipt of Domestic Interested Party Petition Concerning Tariff Classification and Appraisement of Diamond Drill Bits, Diamond Core Bits, and Diamond Specialty Bits

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of domestic interested party petition.

SUMMARY: Customs has received a petition submitted on behalf of a domestic interested party with respect to the tariff classification and appraisement of diamond drill bits, diamond core bits, and diamond specialty bits. The petitioner contends: (1) that the merchandise should be subject to a higher rate of duty than is currently applicable; and (2) that the appraised value of the merchandise should be increased. This document invites comments with respect to the correctness of the current classification and appraisement.

DATES: Comments must be received on or before Sept. 6, 1983.

ADDRESS: Comments (preferably in triplicate) may be submitted to the Commissioner of Customs, Attention: Regulations Control Branch, Room, 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), a domestic interested party petition has been filed with respect to the classification and appraisement of diamond drill bits, diamond core bits, and diamond specialty bits.

The subject merchandise is currently classified under the provision for "interchangeable tools for hand tools or for machine tools, including dies for wire drawing, extrusion dies for metal, and rock drilling bits: other: not suitable for cutting metal: other", in item 649.49, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), at a Column 1 rate of duty of 4.4 percent ad valorem. The petitioner contends that the merchandise is properly classifiable under the provision for "interchangeable tools for hand tools or for machine tools, including dies for wire drawing, extrusion dies for metal, and rock drilling bits: cutting tools with cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten, or over 0.1 percent of vanadium", in item 649.43, TSUS, at a Column 1 rate of duty of 11.1 percent ad valorem.

The petitioner claims that the appraised value of the subject merchandise should be increased to the extent of certain proceeds accruing to the seller as specified in 19 U.S.C. 1401a(b)(1)(E). The petitioner states that it believes that the correct appraised values for the merchandise are those contained in its catalogs.

COMMENTS

Pursuant to section 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments from interested parties on the classification and appraisement issues.

The domestic interested party petition, as well as all comments received in response to this notice, will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), between the hours of 9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

AUTHORITY

This notice is published in accordance with section 175.21(a), Customs Regulations (19 CFR 175.21(a)).

DRAFTING INFORMATION

The principal author of this document was Gerard J. O'Brien, Jr., Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: June 28, 1983.

JOHN P. SIMPSON,
Director, Office of Regulations and Rulings.

[Published in the Federal Register, July 5, 1983 (48 FR 30672)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
Frederick Landis
James L. Watson
Bernard Newman
Nils A. Boe
Gregory W. Carman

Senior Judges

Herbert N. Maletz

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 83–58)

SCHAPER MANUFACTURING CO., DIVISION OF KUSAN, INC., PLAINTIFF *v.* THE HONORABLE DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES, AND THE HONORABLE WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANTS, AND THE MILTON D. MYER COMPANY, INTERVENOR

Court No. 83-3-00333

Before BOE, *Judge.*

Memorandum Opinion and Order Denying Defendants' Motion To Dismiss for Lack of Jurisdiction

(Dated June 16, 1983)

Plaia, Schaumberg & deKieffer (Tom M. Schaumberg and *Alice A. Kipel); Romney, Golant, Martin, Disner & Ashen (Joseph Golant, Robert M. Ashen, Thomas D. Phillips),* for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Leibman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Deborah E. Rand),* for the defendants.

Buell, Blenko, Ziesenheim & Beck (Lynn J. Alstadt), for the intervenor.

BOE, *Judge:* In the instant proceedings the defendants seek to dismiss the above-entitled action for lack or jurisdiction of the subject matter.

The facts set forth by the court in a prior order granting the plaintiff a preliminary injunction have been reincorporated in part herein in connection with the court's consideration of the defendants' motion to dismiss.

The plaintiff is the owner of registered copyrights in certain toy vehicles, which said copyrights pursuant to customs regulations were recorded with the customs service.

Subsequent to the recording of the copyrights in question, the plaintiff was informed by the customs service that 125 cases of imported merchandise were being held by the Port Director of Customs, Pittsburgh, Pennsylvania, which were suspected to be piratical of plaintiff's copyrighted toy vehicles. Pursuant to customs regulations plaintiff demanded the imported toy vehicles be excluded from entry into the United States and posted a bond required by the customs service in the amount of $20,448.00.

Subsequently, on November 5, 1982, plaintiff was further informed that the Port Director of Customs in Pittsburgh, Pennsylvania, was holding two additional shipments of imported merchandise

which, in turn, were suspected of being piratical copies of plaintiff's copyrighted toy vehicles.

With respect to the latter shipments designated as customs entry 83-800602-7 and customs entry 83-800586-6, the plaintiff again demanded their exclusion from entry into the United States and posted bonds in the respective sums of $83,794 and $14,778 as determined and required by the customs service.

Some of the articles contained in the respective imported shipments were piratical copies of the plaintiff's toy vehicles and other articles therein were non-piratical copies. In response to the request of plaintiff that separate bonds be filed with the customs service for each model of a toy vehicle imported on a model by model basis, the customs service at Pittsburgh, Pennsylvania, advised the plaintiff that only one bond per shipment is permitted. Plaintiff requested in writing the withdrawal of two bonds previously filed by it with the customs service in the amount of $83,794 and $14,778, respectively. On December 29, 1982, as required by 19 C.F.R. § 133.43(c)(4), plaintiff filed in writing a statement agreeing to hold the customs service harmless for any consequence of returning the bonds and the release of the detained articles.

Despite the provision contained in 19 C.F.R. § 133.43(c)(4) that the District Director "shall require" both the copyright owner and the importer to sign such a hold harmless agreement, the importer, Milton D. Myer Co., refused to file the required statement.

In a communication by customs under date of February 22, 1983 together with a ruling issued on said date, plaintiff was advised:

> 1. That the single bond required of the plaintiff to be posted for each shipment would not be separated on a model by model basis thereby delineating between piratical or non-piratical copies.
>
> 2. That the imported model, "Super Climber" pick-up truck infringed the Scottsdale Copyright Number VA 101-550 owned by the plaintiff and, accordingly, was denied entry. The request of the importer to re-export said vehicles was granted.
>
> 3. That the imported model "Super Climber" jeep did not infringe on plaintiff's Renegade Copyright Number VA 101-548 and, accordingly, said detained imported vehicles were to be transmitted to the importer.
>
> 4. That the bonds posted by the plaintiff, the copyright owner, should be released and transmitted in full to the importer.

In a communication with an officer of the port district at Pittsburgh, Pennsylvania, plaintiff's counsel was informed that the customs service would transmit to the importer the three bonds hereinbefore referred to and posted by the plaintiff at such time as notice of re-export of the vehicles determined to have infringed on the copyright of the plaintiff has been received by the customs service.

A temporary restraining order with respect to the bonds in question was made and entered by this court under date of March 4, 1983, and a preliminary injunction enjoining customs and the Secretary of the Treasury from releasing these bonds was subsequently entered. 5 CIT—, Slip Op. 83-17 (March 21, 1983).

Subsequent to the entering of the preliminary injunction, customs ruled that approximately half of the subject imports violated plaintiff's copyright and half did not. Pursuant to an order of this court under date of May 24, 1983, and by agreement of the parties, including the Milton D. Myer Company, importer of the goods in question, liquidation of the non-infringing articles was stayed pending a determination by this court on defendants' motion to dismiss this case based on this court's alleged lack of jurisdiction. The articles found by customs to have violated plaintiff's copyright have been re-exported.

The defendants predicate their motion to dismiss upon two grounds:

> (1) The the Customs Court Act of 1980 and particularly 28 U.S.C. § 1581(i) does not grant this court jurisdiction as contended by the plaintiff, and
>
> (2) That the instant action arises out of the copyright laws of the United States, 17 U.S.C. § 602 et seq., and, accordingly, is solely within the jurisdiction of the United States District Courts pursuant to 28 U.S.C. § 1338.

In determining whether a cause of action might be embraced by the jurisdictional grant bestowed upon this court by the Congress, it is necessary that the gravamen of the complaint be determined. Although the complaint in the instant action alleges jurisdictional support under 28 U.S.C. § 1581(i) and 7 U.S.C. §§ 602, 603, from the allegations contained in the complaint as well as from all proceedings had before this court, it is manifest that the thrust of the grievance alleged and the relief sought by the plaintiff relates to the regulations promulgated by customs and their administration and enforcement by that agency.

The customs regulations under which plaintiff's principal claim for relief is sought provide in pertinent part:

> **§ 133.43 Procedure on suspicion of piratical copying.**
>
> (b) *Notice to copyright owner.* If the importer of suspected piratical copies files a denial as provided in paragraph (a) of this section, the district director shall furnish the copyright owner a representative sample of the imported articles, together with notice that the imported articles will be released to the importer unless within 30 days from the date of the notice the copyright owner files with the district director:
>
> (1) A written demand for the exclusion from entry of the detained imported articles; and
>
> (2) A bond in the form and amount specified by the district director, conditioned to hold the importer or owners of such

imported articles harmless from any loss or damage resulting from Customs detention in the event the Commissioner of Customs or his designee determines that the article is not a piratical copy prohibited importation under section 106 of the Copyright Act (17 U.S.C. 106).

* * * * * * *

(c)(4) *Withdrawal of bond.* At any time prior to transmittal of the case to the Commissioner of Customs or his designee for decision, the copyright owner may withdraw a bond filed in accordance with paragraph (b) of this section. Prior to returning the bond to the copyright owner and release of the detained articles, the district director shall require the copyright owner and the importer to file written statements agreeing to hold the United States Customs Service and the district director harmless for any consequence or return of the bond and release of the detained articles. After the withdrawal of a bond, the district director shall release importations of the same article by the same importer without further notice to the copyright owner.

The foregoing regulations derive their authority from the delegation granted by the Congress in 19 U.S.C. §§ 66 and 1624. The provisions thereof are, in part, of particular pertinence:

§ 66. Rules and forms prescribed by Secretary.

The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall give such directions to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.

§ 1624. General regulations.

In addition to the specific powers conferred by this chapter the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter.[1]

It is well established that a regulation adopted by a government agency under authority of an act of Congress has the force and effect of a Federal law when it is asserted as a basis of Federal jurisdiction. *Murphy* v. *Colonial Federal Savings and Loan Association,* 388 F.2d 609 (2nd Cir. 1967); *Farmer* v. *Philadelphia Electric Co.,* 329 F.2d (3rd Cir. 1964).

The purpose of a congressional grant of authority to the Secretary of the Treasury in 19 U.S. §§ 66 and 1624 clearly is to provide

[1] Section 624 of the Tariff Act of 1930. 17 U.S.C. § 603, enacted in 1976, also authorizes the Secretary of the Treasury and U.S. postal service to separately or jointly make regulations for the enforcement of the provisions of title (17).

for the establishment of such procedures and requirements relating to the importation of merchandise as might be dictated by the character of an article as well as by any laws of the United States which might directly or indirectly pertain to the importation of such merchandise. Although a regulation may not be specifically designed to collect revenue in the form of a duty upon importation, its purpose, nonetheless, may cause it to be a concomitant part of the function of raising "revenue from imports."

Viewing the entire context of Customs Regulation 19 C.F.R. § 133.43, this court can discern no purpose in its promulgation other than to serve as a corollary to the acknowledged primary functions of the agency in determining whether merchandise seeking importation should be excluded as well as in determining the proper amount of duty to be assessed upon merchandise granted the right of importation. Clearly, the provisions of 19 C.F.R. § 133.43 are an integral part of the "administration and enforcement" of laws and regulations required in connection with the raising of "revenue from imports" and are embraced within the jurisdictional grant to this court under 28 U.S.C. § 1581(i)(4).

The administration and enforcement of its regulations by customs has consistently been held to be a basis for this court's jurisdiction. *American Air Parcel Forwarding Co.* v. *United States,* 1 CIT 293, 515 F. Supp. 47 (1981). The legislative history of the Customs Court Act of 1980 clearly indicates that this court was designed to have jurisdiction over all "civil actions arising out of import transactions and the Federal statutes affecting international trade." 126 Cong. Rec. H9340 (Sept. 22, 1980). Early drafts of the Act specifically provide for such exclusive jurisdiction in this court. As the legislative history further relates, a modification thereof was made so as to give the federal district courts jurisdiction over cases involving imports which allegedly violate the food and drug laws of the United States. H.R. Rep. No. 96–1235, 96th Cong., 2nd Sess. 47 (1980).

The defendants in support of their motion to dismiss further contend that the subject matter of plaintiff's complaint arises under the copyright laws of the United States. Citing 28 U.S.C. § 1338 the defendants urge that exclusive jurisdiction, accordingly, lies in the United States District Court. Section 1338 provides:

> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

The importation into the United States of copies of copyrighted articles, without the authority of the copyright owner, constitutes an infringement. 17 U.S.C. § 602. The importation and the resulting infringement gives rise to a cause of action against the importer for such remedies as are provided by the act. 17 U.S.C. § 501 et

seq.[2] It is well established, however, that the subject matter of an action relating to the *existence* of a copyright alone does not suffice to grant exclusive jurisdiction to the United States District Court under Title 5, 17 U.S.C. All actions for "infringement" of particular rights possessed by a copyright owner arise under the copyright laws of the United States, thereby conferring original jurisdiction in the federal district court. 17 U.S.C. § 501. *Luckett* v. *Delpark,* 270 U.S. 496 (1926); *Laning* v. *National Ribbon and Carbon Paper Mfg. Co.,* 125 F.2d 565 (7th Cir. 1942); *United States Fire Protection Co.* v. *Monocel Inc.,* 53 F. Supp. 989 (D.N.J. 1943).[3]

In the instant action the plaintiff has neither joined the importer as a party defendant nor has it asserted any claim whatsoever against the importer by way of copyright infringement. Although a paragraph in plaintiff's prayer for relief seeks a reversal of the decision of customs with respect to the merchandise found to be nonpiratical, the thrust of the instant action and the relief sought is (1) the return of the bonds to the plaintiff pursuant to its request for withdrawal and (2) the filing of individual bonds by the plaintiff on a model by model basis instead of one bond for each entry as directed by customs. Where it to be ultimately determined that the bonds in question are entitled to be withdrawn by virtue of plaintiff's request, it would appear to this court that no cause of action, in fact, would remain. The cause of action set forth in plaintiff's complaint is directed against the defendant, the United States, and relates principally to the admission of the subject merchandise and the correctness of the administration of the customs regulations affecting the imported merchandise in question. No claim is made nor sought in the instant action against the United States for infringement.

The exclusivity of the federal district court's jurisdiction attributed by the defendants to the instant action by virtue of its construction of the United States copyright laws, indeed, is diluted, if not lost, in view of the defendants' acknowledgment that the right of protest and subsequent judicial review by this court under 19 U.S.C. § 1514 is available to the importer challenging the determination of customs to exclude merchandise because of its piratical character. *See Norwood Imports* v. *United States,* 48 Cust. CT. 1 (1961). The jurisdiction of this court is not so evanescent as to preclude the plaintiff from seeking review with respect to the administration by customs of its regulations relating to the subject merchandise merely because some of the merchandise has been found by customs to be piratical in character. Whether the plaintiff may or may not intend to institute an action against the importer for "infringement" pursuant to the provisions of the copyright laws of

[2] Section 502—injunctions; section 503—impounding and disposition of infringing articles; section 504—damages, actual and statutory.

[3] Although the decisions cited relate to the exclusive jurisdiction of the federal district courts in actions arising out of the patent laws of the United States, the reasoning in each decision is equally applicable to the copyright laws of the United States and the actions arising thereunder.

the United States is not a matter that concerns this court. Until a claim for such "infringement" is made with an accompanying prayer for the relief provided by the copyright laws of the United States, no cause of action has been instituted within the exclusive jurisdiction of the United States District Court.

The decisions in the cases of *Bally/Midway Mfg. Co.* v. *Regan,* 5 CIT—, Slip Op. 83-51 (May 27, 1983) and *Kidco, Inc.* v. *United States,* 4 CIT—, Slip Op. 82-71 (Sept. 8, 1982) are distinguishable from the instant action. In neither of the foregoing cases did the cause of action or the claim for relief relate to the administration and enforcement of the customs regulations ancillary to the importation and/or exclusion of the particular merchandise there in question. It is noteworthy that in *Kidco* an action previously had been instituted by the plaintiff in the federal district court for infringement.

Accordingly, it is hereby ORDERED that the motion of the defendants' to dismiss the above-entitled action for lack of jurisdiction be and is hereby denied.

(Slip Op. 83-59)

UNITED STATES STEEL CORPORATION, PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court Nos. 83-1-00134, 83-3-00402

Memorandum Opinion and Order

Dated June 16, 1983

WATSON, *Judge:* This opinion resolves a motion to dismiss and other related procedural matters. Court No. 83-1-00134 was commenced on January 26, 1983, to obtain judicial review of a final subsidy determination, published by the International Trade Administration of the Department of Commerce (ITA) on December 27, 1982, in a countervailing duty investigation of certain steel products from the Republic of Korea, and a decision by the ITA, published on December 27, 1982, to suspend the countervailing duty investigation of small diameter welded carbon steel pipes and tubes from Brazil.

On February 15, 1983, the International Trade Commission (ITC) published a final affirmative injury determination and on February 18, 1983, the ITA published a countervailing duty order in the aforementioned Korean steel proceeding.

On March 18, 1983, plaintiff commenced Court No. 83-3-00402 to challenge the same underlying ITA subsidy determinations in the Korean steel countervailing duty investigation as were complained of in the earlier Court No. 83-1-00134.

On March 25, 1983, defendants moved to sever and dismiss for prematurity the portion of the first action challenging the ITA's final subsidy determinations in the Korean investigation. Defendants have also moved to suspend the later action pending resolution of their motion to dismiss the earlier action. Plaintiff has moved to consolidate both actions.

In support of their motion to sever and dismiss the Korean part of the earlier action (Court No. 83-1-00134), defendants note that this Court possesses jurisdiction to review what they characterize as an "affirmative final determination" in a countervailing duty proceeding only if the action is commenced within 30 days *after* the publication of a *countervailing duty order.* 19 U.S.C. § 1516a(a)(2)(A)(ii). In contrast, plaintiff views the disputed ITA subsidy determinations as "negative final determinations," eligible for review under 19 U.S.C. § 1516a(a)(2)(B)(ii) by means of an action commenced within 30 days after publication of notice of the *determination.*

The Court rejects defendant's characterization of the challenged determination as an indivisible affirmative determination which cannot be judicially reviewed in an action commenced prior to the publication of a countervailing duty order.

In *Republic Steel Corp.* v. *United States,* 4 CIT —, Slip Op. 82-55, (July 15, 1982), this Court held that preliminary determinations by the ITA that a particular practice is not a subsidy or that a particular producer is not receiving a subsidy are negative determinations, and therefore subject to judicial review. With one exception, the Court sees the same sort of determinations challenged in the action sought to be dismissed and consequently sees the same grounds for judicial review as in *Republic.*

Only that portion of the earlier action which challenges the ITA's methods of quantifying the subsidy from various preferential tax and tariff incentives to certain Korean steel producers was premature. The ITA's use of methodology allegedly undervaluing the amount of countervailable subsidies did not constitute a discrete "negative" determination under *Republic,* and did not present the same potential for interim injury as did the determinations that a particular practice was not a subsidy or that a particular producer was not receiving a subsidy.

For these reasons, and in the interest of efficient judicial resolution of these disputes, it is hereby

ORDERED that Count IV of plaintiff's complaint in Court No. 83-1-00134 which seeks to challenge the ITA's methods of quantifying the subsidy from various preferential tax and tariff incentives to various Korean steel producers is hereby severed and dismissed; and it is further.

ORDERED that the portion of Court No. 83-1-00134 which challenges the ITA's decision to suspend the countervailing duty investigation involving small diameter welded carbon steel pipes and

tubes from Brazil is hereby severed and designated as Court No. 82-1-00134S; and it is further

ORDERED that the remainder of Court No. 83-1-00134 is hereby consolidated with Court No. 83-3-00402; and it is further

ORDERED that plaintiff United States Steel shall file amended complaints in Court No. 83-1-00134A and Consolidated Court No. 83-1-00134 within 15 days in accordance with the above-ordered severances and consolidations; and it is further

ORDERED that defendants shall serve answers to the amended complaints within 15 days from the service of such complaints; and it is further

ORDERED that defendants shall, within 30 days from the date of filing of the amended complaints, file the administrative records; and it is further

ORDERED that defendants' motion to suspend Court No. 83-3-00402 is denied.

(Slip Op. 83-60)

SAMUEL KATUNICH, JANE H. M. REGO AND GUY SERRA, PLAINTIFFS *v.* RAYMOND P. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Before: RE, *Chief Judge.*

Court No. 81-9-01158

Memorandum and Order

(Dated June 17, 1983)

RE, *Chief Judge:* Plaintiffs have moved for an order allowing access to confidential documents contained in the administrative record of the Department of Labor's trade adjustment assistance investigation No. TA-W-9444. The defendant has petitioned the court for a protective order barring any disclosure.

In order to rule properly on these motions, the court must make an *in camera* inspection of the documents in question. It also must weigh the need of the plaintiffs for the documents in prosecuting this action as against the need of the Government in the public interest to maintain their confidentiality.

Plaintiffs were workers at U.S. Steel's Monroeville Research Laboratory. The Secretary of Labor's investigation into plaintiffs' petition disclosed that they were engaged in various activities related to the production of steel. On that basis, the Secretary may certify plaintiffs for adjustment assistance benefits only if their separation from employment "was caused importantly by a reduced demand for their services originating at facilities whose workers independently meet the statutory criteria of Section 222 of the Trade Act of 1974 for certification and that reduction must be directly related

to the product impacted by imports." 46 Fed. Reg. 35825 (July 10, 1981).

According to the Secretary's investigation, a series of related adjustment assistance investigations revealed that "the preponderance of steel products manufactured at U.S. Steel facilities have not been adversely affected by imports." *Id.* The resultant finding by the Secretary was that plaintiffs failed to satisfy the third criterion of Section 222 of the Trade Act of 1974, 19 U.S.C. § 2272 (1976), namely that increased imports of articles, like or directly competitive with articles produced by plaintiffs' employing firm, contributed importantly to the absolute decline in sales or production of the firm. Thus, the Secretary concluded that the separation of plaintiffs was not related to facilities whose workers independently met the statutory criterion.

In reviewing the administrative record, the court does not find the factual basis for the Secretary's final determination. Although the record contains what appears to be production data for various U.S. Steel facilities for the year 1979, it is devoid of comparable data for those same facilities for the relevant months in 1980. Also conspicuously absent from the record is any import data for like or directly competitive steel products for the applicable period.

The Secretary's failure to include the factual basis for his final determination leaves the administrative record imcomplete. The court, therefore, is unable fully to assess the record and weigh the competing needs of the parties for the information sought to be disclosed.

Accordingly, it is hereby

ORDERED that this action is remanded to the Secretary of Labor for the purpose of furnishing the court with the basis of his final determination; and it is further

ORDERED that the Secretary shall file and serve his explanation by the close of business on Friday, July 15, 1983.

(Slip Op. 83-61)

MAPLE LEAF FISH CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-10-01412

Before, CARMAN, *Judge.*

Memorandum Opinion and Order

[Motion to dismiss denied.]

(Dated June 21, 1983)

Barnes, Richardson & Colburn, (David O. Elliott on the motion) for the plaintiff. *J. Paul McGrath,* Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Madeline B. Kuflick* on the motion) for the defendant.

CARMAN, *Judge:* Defendant moves pursuant to Rules 12(b)(1) and 12(b)(5) of this court to dismiss this action arguing this court lacks jurisdiction to review the decisions of the President and the recommendation of the International Trade Commission (ITC) as set forth in the complaint and/or plaintiff has failed to state a claim upon which relief can be granted. Plaintiff asserts the court has jurisdiction pursuant to 28 U.S.C. § 1581(a) and i(2).

This action was commenced by plaintiff, an importer of frozen battered and breaded mushrooms. These mushrooms were manufactured and exported from Canada and classified as mushrooms prepared or preserved under item 144.20 of the Tariff Schedules of the United States (TSUS). The duty was assessed at the rate of 3.2 cents per pound plus 10% *ad valorem*. Supplemental duties in the amount of 20% *ad valorem* were assessed under item 922.55 pursuant to Presidential Proclamation 4801, October 29, 1980, which granted import relief under the escape clause provisions of the Trade Act of 1974 (19 U.S.C. § 2251 *et seq.*). Plaintiff seeks to restrict the application of the Presidential Proclamation to imported canned mushrooms and further seeks reliquidation of entries which are the subject of the present action under item 144.20, with refunds of all supplemental duties assessed under item 922.55.

The complaint alleges that a trade association consisting of mushroom canners and growers filed on March 14, 1980 a petition with the ITC pursuant to Section 201(a)(1) of the Trade Act of 1974 for import relief with respect to canned mushrooms under item 144.20.[1] The ITC commenced an investigation to determine whether mushrooms prepared or preserved as described in item 144.20 were being imported into the United States in such increased quantities that there was a substantial cause of serious injury or threat of injury to a domestic industry producing an article like or directly competitive with the imported article. The ITC duly published in the Federal Register notice of a public hearing to determine whether mushrooms prepared or preserved provided for in item 144.20 (which included frozen battered and breaded mushrooms) were being imported into the United States in such increased quantity

[1] TSUS item 144.20 provides in part:

SUBPART D.—MUSHROOMS AND TRUFFLES

144.20	Otherwise prepared or preserved	* * *
05	Frozen	* * *
09	Straw mushrooms other than frozen	* * *
	Other:	
	In containers each holding not more than 9 ounces:	
27	Whole (including buttons)	* * *
31	Sliced	* * *
37	Other	* * *
	In containers each holding more than 9 ounces:	
43	Whole (including buttons)	* * *
47	Sliced	* * *
53	Other	* * *

Continued

that they were causing serious injury or threat of injury to a domestic industry.[2] A public hearing was held in early June 1980.

While the complaint indicates the ITC seemed to give its primary focus to the canned mushroom industry, the ITC concluded nevertheless the frozen mushrooms including frozen battered and breaded mushrooms should be treated for import relief purposes as canned mushrooms. The complaint alleges further that the conclusions of the ITC in regard to frozen mushrooms including frozen battered and breaded mushroom were supported by no investigation, no findings of fact and no specific conclusions of law.

Plaintiff contends that although the ITC conducted a public hearing and found that the domestic canned mushroom industry was experiencing serious injury, or threat thereof, because of increased imports of canned mushrooms and entitled to import relief, it was improper for the ITC to similarly treat the frozen mushroom industry because there was no evidence to support such findings. Plaintiff further contends that the inclusion of frozen mushrooms in the proclamation of the President granting import relief as to frozen mushrooms is illegal and ultra vires because the findings of injury as to the frozen mushroom industry by the ITC were not supported by any evidence or investigation, citing *Schmidt Pritchard & Co.* v. *United States*, 47 CCPA 152, C.A.D. 750, *cert. denied*, 364 U.S. 919 (1960).

Defendant contends that since the plaintiff asserts that the determinations and recommendations of the ITC were unsupported

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[2] Investigation No. TA-201-43, 45 Fed. Reg. 21753 (1980):

Mushrooms: Investigation and Hearing

Investigation instituted. Following receipt of a petition on March 14, 1980, filed on behalf of the American Mushroom Institute, a trade association of the U.S. mushroom canning industry, the United States International Trade Commission on March 24, 1980, instituted an investigation under section 201(b) of the Trade Act of 1974 to determine whether mushrooms, prepared or preserved [provided for in item 144.20 of the Tariff Schedules of the United States [TSUS]], are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.

Public hearing ordered. A public hearing in connection with this investigation will be held in the Commission's Hearing Room, U.S. International Trade Commission Building, 701 E Street, NW., Washington, D.C. 20436, beginning at 10:00 a.m., e.d.t., on Monday, June 9, 1980. Requests for appearances at the hearing should be received in writing by the Secretary of the Commission at his office in Washington, D.C. not later than noon, June 2, 1980.

Suggested prehearing procedures. To facilitate the hearing process, it is requested that persons wishing to appear at the hearing submit prehearing briefs enumerating and discussing the issues which they wish to raise at the hearing. Nineteen copies of such prehearing briefs should be submitted to the Secretary of the Commission no later than the close of business Friday, May 30, 1980. Copies of any prehearing briefs submitted will be made available for public inspection in the office of the Secretary. While submission of prehearing briefs does not prohibit submission of prepared statements in accordance with section 201.12(d) of the Commission's Rules of Practice and Procedure (19 CFR 201.12(d)), it would be unnecessary to submit such a statement if a prehearing brief is submitted instead. Any prepared statements submitted will be made a part of the transcript. Oral presentations, should, to the extent possible, be limited to issues raised in the prehearing briefs.

Prehearing conferences will be held on Friday, May 16, 1980, at 10:00 a.m., e.d.t., in Room 117 of the U.S. International Trade Commission Building.

Persons not represented by counsel or public officials who have relevant matters to present may give testimony without regard to the suggested prehearing procedures outlined above.

Inspection of petition. The petition filed in this case is available for public inspection at the Office of the Secretary, U.S. International Trade Commission, and at the New York City Office of the U.S. International Trade Commission, located at 6 World Trade Center.

By order of the Commission.

Issued: March 25, 1980.

KENNETH R. MASON,
Secretary.

by the evidence that plaintiff seeks substantive review of the findings of the ITC which is not available in this court, citing *United States* v. *George S. Bush & Co.* 310 U.S. 371 (1940).

It is clear this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a) since plaintiff filed a protest against liquidations assessing supplemental duties on the imported frozen mushrooms.[3]

Although jurisdiction over the subject matter exists, the question presented is whether or not the exercise of discretionary authority conferred upon the ITC and the President is subject to the judicial review of this court.

The principle is clearly established that preclusion of judicial review will not be lightly inferred. *Suwannee Steamship Co.* v. *United States,* 70 Cust. Ct. 327, 329, 354 F. Supp. 1361 (1973). Indeed judicial review of final agency action is not precluded unless there is persuasive reason to believe that that was the intention of Congress. *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971); *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967). In *Barlow* v. *Collins,* 397 U.S. 159, 166 (1970), the court pointed out that judicial review of administrative action is the rule and nonreviewability the exception.

In *Abbott, supra,* in considering whether or not judicial review was available unless expressly precluded by statute, the court said:

> The question is phrased in terms of "prohibition" rather than "authorization" because * * * judicial review of a final agency action * * * will not be cut off unless there is persuasive reason to believe that * * * was the purpose of Congress * * * [T]his type of judicial review (has) been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption that judicial review to one "suffering legal wrong because of agency action * * *" so long as no statute precludes such relief of action is not committed by law to agency discretion * * * The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no remedy in court * * *."

387 U.S. 140

In the instant case, there is no express statute prohibiting review. The complaint alleges in substance mistakes in law and fact. Plaintiff contends that the administrative conclusion that the importation of frozen mushrooms caused injury to an industry in the United States was unsupported by any investigation or any evidence. While the scope of review is limited, judicial review of administrative actions to determine whether or not there has been administrative abuse of discretion is available. *Suwannee Steamship Co., supra.*

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[3] Given that subject matter jurisdiction can be found in 28 U.S.C. 1581(a), plaintiff's alternative reliance on 28 U.S.C. 1581(i) must be rejected. 28 U.S.C. 1581(i) must not be used to circumvent 28 U.S.C. 1581(a). See *United States* v. *Uniroyal,* 69 CCPA—, 687 F. 2d 467 (1981).

In assuming jurisdiction, the court's review will be confined to examining whether the administrative action of the ITC and the President has been exercised in such manner as to conform with the procedural requirements of statutory authority and performed according to law. See *Farr Man & Co.* v. *United States,* 4 CIT—, Slip Op. 82-61 (July 26, 1982); *Best Foods, Inc.* v. *United States,* 37 Cust. Ct. 1, C.D. 1791 147 F. Supp. 749 (1956). The court holds that judicial review extends to the decisions made by the ITC and the President.

The motion to dismiss is DENIED.

Dated: New York, New York, June 21, 1983.

GREGORY N. CARMAN,
Judge.

(Slip Op. 83-62)

SILVER REED AMERICA, INC. and SILVER SEIKO, LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, CONSUMER PRODUCTS DIVISION, SCM CORP., INTERVENOR

Court No. 80-6-00934

Before NEWMAN, *Judge.*

On Plaintiffs' Motion Pursuant to Rule 56.1(a) and Intervenor's Cross-Motion To Dismiss for Failure To Prosecute

[Plaintiffs' motion granted and intervenor's cross-motion denied.]

(Dated June 22, 1983)

Arter Hadden and Hemmendinger, Esqs. (Christopher Dunn, Esq. of counsel), for the plaintiffs.

J. Paul McGrath, Assistant Attorney General *(David M. Cohen,* Director, Commercial Litigation Branch and *Velta A. Melnbrencis,* Assistant Director), for the defendant.

Eugene L. Stewart and *Terrence P. Stewart, Esqs.,* for the intervenor.

1

NEWMAN, *Judge:* Plaintiffs have instituted this action under section 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2), to contest a final antidumping determination by the United States Department of Commerce ("Commerce") covering portable electric typewriters from Japan (45 FR 30618, May 9, 1980).

Presently before the Court are:

Plaintiffs' motion under rule 56.1(a) of the Rules of the Court of International Trade for an order directing that plaintiffs submit a motion for review upon the agency record of Commerce's determination of sales at less than fair value; intervenor's response to

plaintiffs' motion consisting solely of its cross-motion to dismiss the action for failure to prosecute pursuant to Rule 41(b)(2); defendant's response to plaintiffs' motion seeking, with intervenor, that the action be dismissed for lack of prosecution; but alternatively, if the Court denies intervenor's cross-motion, then defendant has no opposition to plaintiffs' motion, provided defendant is allowed at least sixty days to respond to plaintiffs' motion for review upon the agency record.

2

Plaintiffs' summons and complaint were filed on June 6, 1980 and July 3, 1980, respectively; answers were filed by intervenor on August 11, 1980, and by defendant on August 28, 1980. Apparently, the most recent activity in this action was the entry of the Court's order regarding discovery on April 28, 1981. 1 CIT 265 (1981).

Intervenor, with the approval of defendant, contends that the inactivity in this case from April of 1981 to May of 1983, on its face, should persuade this Court to dismiss the action. According to intervenor, in support of its cross-motion, this action should have been dismissed on or before August 31, 1981 by the Clerk of this Court under the provisions of Rule 86 of the Rules of the Court of International Trade. Failing this, intervenor urges that the Court should exercise its discretion under Rule 41(b)(2) to dismiss the action.

However, intervenor's reliance upon Rule 86 is misplaced. By its very terms, dismissal by the Clerk pursuant to Rule 86 is limited to a situation where an action has remained *unassigned, viz:* "At the expiration of the applicable 12-month period an *unassigned* action on the Joined Issue Calendar shall be dismissed for lack of prosecution, and the Clerk shall enter an order of dismissal without further direction from the Court unless a motion is pending." Rule 86(b) of the Rules of the Court of International Trade (emphasis added). But indisputably, this action was, indeed, heretofore assigned to me by order of Chief Judge Re, and clearly, then, the dismissal provisions of Rule 86(b) are not applicable here.

3

The second argument advanced by intervenor for dismissal of this action deserves a more lengthy discussion.

Intervenor cites several authorities to the effect that it is within the Court's discretion to dismiss an action on the sole basis of delay by plaintiff without regard to whether any party has been prejudiced thereby. While there is no doubt that the Court does have such discretion under Rule 41(b)(2), this Court must be persuaded to exercise that discretion. Under all the facts and circumstances here, I have concluded that intervenor's cross-motion should be denied in the interest of justice.

The critical seriousness of granting a motion to involuntarily dismiss a case lies in the obvious fact that a plaintiff is denied its day in court.

As aptly pointed out by plaintiffs in opposition to intervenor's cross-motion to dismiss, the federal courts adhere to the view that dismissal for failure to prosecute is a "severe sanction" to be applied only in extreme situations. *Durham* v. *Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967); and *Camps* v. *C & P Tel. Co.*, 692 F.2d 120 (D.C. Cir. 1981). In point of fact, the *Durham* Court summarized the case law and observed: "The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff." 385 F.2d at 368.

It is plain, even from cases relied upon by intervenor, that the courts, in determining whether or not to exercise their discretion to dismiss for failure to prosecute, consider various factors in addition to a mere delay in proceeding. *Hiranport Co.* v. *United States Treasury Dept.*, 69 CCPA —, 664 F.2d 284 (1981); *Moore* v. *Telefon Communications Corp.*, 589 F.2d 959 (9th Cir. 1978); and *Messenger* v. *United States*, 231 F.2d 328, (2d Cir. 1956).

While the above cases demonstrate that, in an appropriate situation, the courts will, without more, dismiss upon a showing of unreasonable delay in proceeding, I find that the situation here does not present such circumstance.

Plaintiffs urge that their two-year delay in proceeding is largely justified by their expectation that a decision by our Court of Appeals in the consolidated case of *Brother Industries, Ltd.* v. *United States, et al.*, 3 CIT 125, Slip Op. 82–34, 540 F. Supp. 1341 (April 30, 1982), Appeal No. 82–24 filed May 13, 1982 pending, in which these plaintiffs, as well as this intervenor, were parties could render this action moot.[1]

Brother is an exceptionally complicated decision, involving in part, a number of contentions advanced by the very parties here. In sum, this Court's opinion in *Brother* (April 30, 1982) denied all of the contentions advanced by SCM (this intervenor) in the consolidated Actions I and Action II. SCM (intervenor here) has appealed the decision and, among other things, again raised the issue whether deduction of any general selling expenses was permissible in calculating foreign market value.

A major aspect of plaintiffs' case here is their contention that Commerce incorrectly calculated foreign market value by failing to make the proper allowance for differences in circumstances of sale in the home and American markets. Specifically, plaintiffs argue that Commerce erred as a matter of law in limiting the deduction of home market general selling expenses.

[1] Interestingly, on June 28, 1982 this Court granted a stay of its April, 1982 decision, upon SCM's request (this intervenor), pending resolution of the *Brother* appeal.

An issue in *Brother* was whether *any* general selling expenses were deductible from home market price, while in the instant case the question is whether Commerce may *limit* deductions of general selling expenses. The latter question is subsumed by the former for, if the Court of Appeals holds that no general selling expenses are deductible, then there would be no such deduction to limit. Hence, the issue of the limitation of the deduction in the present case could be mooted.

Significantly, the plaintiffs have now gone forward in the instant action by moving under Rule 56.1. Arguably, plaintiffs should have previously sought a stay of these proceedings pending a decision in the *Brother* case, as suggested by intervenor. Nevertheless, plaintiffs did not act in a total disregard as was the situation in the cases submitted by intervenor. Absent some showing of prejudice to defendant or to intervenor, and under all the circumstances, justice requires that plaintiffs shall not be deprived of their day in court.

Importantly, too, intervenor moved to dismiss only after plaintiffs tangibly showed their intentions to actually proceed. Intervenors certainly had the opportunity, prior to plaintiffs' submission of their current motion, to complain—or act—about the delay in proceeding. Now that plaintiffs have gone forward and are proceeding, absent any showing of prejudice, dismissal of this action is unwarranted.

In light of the foregoing, intervenor's cross-motion to dismiss is hereby denied.

4

We turn to plaintiffs' motion for an order pursuant to Rule 56.1(a) directing a motion for submission upon the agency record.

This action, having been brought to review a final antidumping determination under section 1516a(a)(2) of the Tariff Act of 1930, as amended, is properly reviewable upon the agency record in accordance with Rule 56.1. *See:* 28 U.S.C. § 2640(b); 19 U.S.C. 1516a(b). Consequently, plaintiffs' application is granted, and plaintiffs are hereby directed to file their motion for review upon the agency record within five days of the entry of this order.

Further, it is ordered that defendant and intervenor shall have sixty days from service of plaintiffs' motion to respond.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *March 24, 1983.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/183	Ford, J. June 21, 1983	Fancy Industries, Inc.	82-4-00455	Item 389.62 15%+25¢ per lb.	Item 706.24 20¢	J.E. Mamiye & Sons v. U.S. (C.D. 4878) aff'd	San Juan Tote bags
P83/184	Ford, J. June 21, 1983	Uni-King of Hawaii	78-122-02088, etc.	Item 389.60 25¢ per lb.+15%	Item 706.24 20%	U.S. v. J.E. Mamiye & Sons, No. 81-6 11/19/81	Honolulu Handbags
P83/185	Landis, June 21, 1983	Corning Glass Works	81-10-01434	Item 425.04 6%	Item 437.76 Free of duty	Agreed statement of facts	New York Fractions of human blood
P83/186	Landis, J. June 21, 1983	Electrohome Ltd.	82-4-00586	Items 722.40, 722.70, 722.50, etc. Various rates	Item 685.19 5%, 4.8%, or 4.7%	Agreed statement of facts	Buffalo Projection monitors together with their desk stands, pedestal bases, screens, interface modules and harnesses
P83/187	Landis, J. June 22, 1983	Gund, Inc.	81-6-00703	Items 737.95 17.5% without allowance under item 807.00	Items 737.95/ 807.00 17.5% upon full value of imported articles, less cost or value of U.S. components	Agreed statement of facts	Miami American goods returned; toy animal skins assembled abroad in whole or in part of U.S. fabricated components
P83/188	Landis, J. June 22, 1983	North American Foreign Trading Corp.	81-8-01111	Items 716.18/ 806.20 13.4% upon value of repairs	Items 688.36/ 806.20 5.3% upon value of repairs	Executive Order 12371	New York American goods returned; watch modules
P83/189	Newman, J. June 22, 1983	Rank Precision Industries, Inc.	76-6-01525	Item 708.23 15% or 12.5%	Item 685.10 6%	Rank Precision Industries, Inc. v. U.S. (C.A.D. 1269)	New York Varotal assemblies

P83/190	Boe, J. June 22, 1983	A & A International Inc.	81-12-01762, etc.	Merchandise separately classified as watch or clock movements classified under items 716.18, 720.18, 720.14, 710.16, etc. and assessed with duty at various rates	Item 676.20 5%, 4.8%, or 4.7% (merchandise marked "A") Item 678.50 4.7% (merchandise marked "B") Item 688.40 5.5% (merchandise marked "C") Item 688.45 5.3% or 5.1% (merchandise marked "C")	Texas Instruments, Inc. v. U.S. 1 CIT 236, aff'd 3/25/82	Portland Solid state timing devices; entirety with article in which incorporated (merchandise marked "A", "B", or "C")
P83/191	Boe, J. June 22, 1983	Magnovox Consumer Electronic Co.	81-7-00831	Merchandise classified as combination articles with constructively separated clock movements classified under items 716.18 or 720.14 and assessed with duty at various rates	Item Item 685.24 9.9% Dutiable upon basis of export value of transaction value; said value equal to sum of appraised values of radio receivers and timepiece portions thereof	Texas Instruments, Inc. v. U.S. 1 CIT 236, aff'd 3/25/82	Los Angeles Solid state timing devices; entirety with article in which incorporated.

United States Court of International Trade

Petition for Writ of Certiorari Filed With Supreme Court

June 13, 1983

APPEAL No. 83-578—Committee to Preserve American Color Television (a.k.a. COMPACT), et al *v.* United States—28 U.S.C. 1581(i) RESIDUAL Appeal from Slip Op. 82-101, filed November 18, 1982, Affirmed May 2, 1983, Supreme Court No. 82-2045, Petition filed by the Appellant.

Appeal to United States Court of Appeals for the Federal Circuit

APPEAL No. 83-1106—Jarvis Clark, Co. *v.* The United States—"RAILROAD AND RAILWAY ROLLING STOCK * * * * OTHER CARS, NOT SELF-PROPELLED"—TSUS—Appeal from Slip Op. 83-38, filed June 13, 1983.

Decision of United States Court of Appeals for the Federal Circuit

APPEAL No. 82-15—United States *v.* Border Brokerage—LOGGING IMPLEMENTS AND TRACTOR PARTS—AGRICULTURAL IMPLEMENTS—TSUS—Appeal from Slip Op. 81-123 filed February 25, 1982—Affirmed May 11, 1983.

APPEAL No. 83-594—Leather's Best Inc., *v.* The United States—LEATHER—Appeal from Slip Op. 82-85 filed on December 3, 1982—Affirmed June 10, 1983.

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